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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 381

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN SURETY COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above case on June 24, 1943.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana, overruling a

motion to strike certain portions of the complaint, is reported in 39 F. Supp. 819. Its opinion on the merits is reported in 44 F. Supp. 871. The opinion of the Circuit Court of Appeals (R. 94–98) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 24, 1943 (R. 98). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the provisions of Section 21 of the Act of June 6, 1902, and Article 9 of the standard form of Government construction contract, the United States may recover from the contractor or his surety liquidated damages for delay, computed at the specified rate, for the period between the stipulated completion date and the date upon which the United States terminated the contractor's right to proceed with the work on account of default.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Act of June 6, 1902 (40 U. S. C. § 269) and of the Government construction contract here involved are set forth in the Appendix, pp. 15–16.

STATEMENT

The facts, as disclosed by the record, may be summarized as follows:

On June 24, 1931, the United States of America, acting through the Treasury Department (R. 44), and one John V. Grogan entered into a contract requiring the latter to construct certain public buildings at the United States Inspection Station, Babb-Piegan, Montana (R. 77). Respondent, American Surety Company, became the surety on Grogan's bond to the United States, conditioned upon his faithful performance of the contract (R. 24–26, 77–78). The United States gave Grogan notice to proceed under the contract on July 8, 1931 (R. 78), thereby fixing March 4, 1932 as the completion date pursuant to Article 1 of the contract (R. 10). For causes considered to be excusable under Article 9 of the contract, the United States, at Grogan's request and with the consent of respondent, extended the time for completion of the contract to June 20, 1933 (R. 78). Grogan failed to complete the work by the extended date, and on July 20, 1934, the work still not having been completed, the United States terminated the contractor's right to proceed under the contract (R. 78–79). In the completion of the work, which at respondent's request was let by the United States to the lowest responsible bidder, the United States necessarily expended $2,044.04

more than it would have been required to expend had Grogan completed the work according to his contract (R. 79–80).

The United States brought suit in the District Court against Grogan and respondent to recover such excess costs and also to recover liquidated damages of $9,875 (R. 1–26). The latter item was based upon Article 9 of the contract and paragraph 5 of the specifications, requiring the contractor to pay the Government the sum of $25 "as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract" (R. 8, 78); and the liquidated damages were computed in the Government's complaint for the 395 days between June 20, 1933, the extended stipulated date of completion, and July 20, 1934, when the contractor's right to proceed was terminated (R. 8).

Grogan was not served and never appeared. The district court denied respondent's motion to strike from the complaint the paragraph which alleged a right to liquidated damages (R. 27–29; 39 F. Supp. 819), and after trial without a jury rendered judgment for the United States for $2,044.04 as excess costs of completion and $9,875 as liquidated damages for delay (R. 76–81). On appeal, the circuit court of appeals, acting by two judges (Circuit Judge Haney, who was

present at the argument, not participating in the decision), affirmed the judgment as to the excess cost but reversed as to the liquidated damages (R. 94–98).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Article 9 of the standard form of Government construction contract did not confer upon the United States the right to recover any liquidated damages if the Government terminated the contractor's right to proceed after the completion date fixed in the contract but prior to actual completion.

2. In failing to hold that Section 21 of the Act of June 6, 1902, and the long-established administrative practice of the Government under Article 9 of the standard form of Government construction contract, required that Article 9 be construed to entitle the United States to liquidated damages accruing between the contract completion date and the date of termination of the contractor's right to proceed.

3. In failing to hold that irrespective of Article 9 of the contract, the United States was entitled to recover liquidated damages in the amount of $9,875 by virtue of Section 21 of the Act of June 6, 1902, and paragraph 5 of the specifications.

4. In reversing the judgment of the District Court in respect of the award of liquidated damages.

REASONS FOR GRANTING THE WRIT

Section 21 of the Act of June 6, 1902 (Appendix, p. 15), requires that in all Government contracts for the construction of any public building under the control of the Treasury Department, "a stipulation shall be inserted for liquidated damages for delay," which shall be "conclusive and binding upon all parties." It provides that in all suits on such a contract or on "any bond given in connection therewith," it shall not be necessary for the United States "to prove actual or specific damages sustained by the Government by reason of delays." Paragraph 5 of the specifications made part of the contract here involved (Appendix, p. 16) binds the contractor to pay to the Government $25 "as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." Article 9 of the contract (Appendix, pp. 15–16), which appears in every standard form Government construction contract, provides that if the contractor refuses or fails to prosecute the work with diligence or to complete it within the contract time, the Government may terminate the contractor's right to proceed, prosecute the work to completion, and recover from the contractor and his sureties any excess cost occasioned the Government. It further provides that if the Government does not terminate the right of the contractor to proceed, he and his sureties shall be liable to the Government for the amount set forth

in the specifications, as liquidated damages, for each calendar day of delay until the work is completed or accepted.

The court below held the United States not entitled to recover liquidated damages in the instant case on the ground that Article 9 of the contract authorized liquidated damages only if the Government permitted the contractor to complete the work after the completion date fixed in the contract, and not where the Government terminated the contractor's right to proceed before the work was actually completed. It is believed that the court below has decided an important question involving a provision of a widely-used standard form Government construction contract, in a manner contrary to the purpose of the provision and of the statute requiring it, and also to the administrative interpretation.

1. Section 21 of the Act of June 6, 1902 (Appendix, p. 15), requiring that a stipulation "for liquidated damages for delay" be inserted in all Government contracts for the construction of any public building under the control of the Treasury Department, was enacted for the avowed purpose of permitting recovery by the Government not only of its actual damages, but also of damages for "the inconvenience to the public and the Government in being deprived of the use of the public building," an element of damage ordinarily impossible to prove in monetary terms. H. Rept. No. 1794, 57th

Cong., 1st Sess.; 35 Cong. Rec. 4835; see 3 Comp. Dec. 282. Article 9 of the contract and paragraph 5 of the specifications, providing for liquidated damages for each day's delay in completion, are in compliance with the mandate of the 1902 statute (see 4 Comp. Dec. 306, 308), and constitute "an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform." See *Robinson* v. *United States*, 261 U. S. 486, 488; cf. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

Article 9 of the contract requires the contractor or his sureties to pay the Government the amount set forth in the specifications ($25) "for each calendar day of delay until the work is completed or accepted," in lieu of actual damages for delay which the article recites "it will be impossible to determine."

Under Article 9, the liquidated damages become payable "if the Government does not terminate the right of the contractor to proceed," and the contractor continues the work. The Government did not exercise its right to terminate the contract on June 20, 1933, the stipulated completion date as extended, although the work was not then completed, and allowed the contractor to continue the work until July 20, 1934, when it terminated his right to proceed on account of noncompletion. It is in this situation that Article 9 calls for the accrual and payment of daily liquidated damages.

There is nothing in Article 9 or any other provision of the contract which operates to forfeit the Government's right to accrued liquidated damages if it later exercises its contractual power to terminate the contractor's right to proceed on account of default.[1] The court below held to the contrary by reading Article 9 as though it provided for liquidated damages only "if the Government *never* terminates" the contractor's right to proceed. This construction of Article 9 is certainly no more compelling semantically than that we suggest,[2] and the choice between the two renditions is made simple in the light of the practical effect of each and its relation to the Congressional objective. To interpret Article 9 as sanctioning the recovery of accrued liquidated damages up to the date of termination fully effectuates the prime purpose of the 1902 Act, to eliminate the uncertainties and dif-

[1] While Article 9 calls for the payment of liquidated damages "until the work is completed," the United States in this case does not seek recovery of liquidated damages beyond the date upon which the contractor's right to proceed with the work was terminated. Consequently this case raises no question as to the Government's right to liquidated damages beyond such date.

[2] To uphold the right to liquidated damages as they accrue, notwithstanding subsequent termination of the contractor's right to proceed, merely requires that the phrase in Article 9, "*if* the Government does not terminate the right of the contractor to proceed", be read "*so long as* the Government does not terminate" his right to proceed. Such an interpretation of the word "if" has judicial sanction where it results in a reasonable construction of a contract. Cf. *Firemen's Fund Ins. Co.* v. *Congregation Rodeph Sholom*, 80 Ill. 558, 559; *Campau* v. *Chene*, 1 Mich. 400, 413.

ficulties of establishing the actual damages to the Government caused by delay in obtaining the use of a public building—damages generally consisting of a public inconvenience not to be measured in monetary terms. Cf. *Wise* v. *United States*, 249 U. S. 361, 366; 3 Comp. Dec. 282.[3] Such has also been the interpretation given to Article 9 by the General Accounting Office, for in making final settlement with contractors whose right to proceed has been terminated on account of default, that Office always withholds all accrued liquidated damages not already deducted from the balance otherwise due to the contractor.[4]

On the other hand, the construction adopted below does violence to the purpose of the liquidated damage provision, and leaves it entirely to the contractor whether such damages will ever be paid. The contractor could evade payment of a substantial amount of accrued damages by merely abandoning the work at any point short of sub-

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[3] Contracts must be construed with reference to existing law (*Wilson* v. *Rousseau*, 4 How. 646, 685), which enters into and forms part of the contract. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Antoni* v. *Greenhow*, 107 U. S. 769, 774; *Abilene National Bank* v. *Dolley*, 228 U. S. 1, 5. The principle that ambiguous language in a contract is to be construed favorably to one of the parties—for example because he is a surety—must give way to the policy of the statute which required the contract. Cf. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, 205.

[4] 8 Comp. Gen. 266; 10 Comp. Gen. 433, 437; 11 Comp. Gen. 81; 15 Comp. Gen. 123.

stantial completion; and he might be led to do so whenever he determines that the excess cost of completion, plus such actual damages from delay as the Government may be able to establish, will be less than the total liquidated damages.[5] To impose upon the Government the burden of establishing actual damages for delay despite the inclusion of the stipulation for liquidated damages nullifies the Congressional purpose in requiring such a provision. Moreover, the meaning given to Article 9 by the court below would require that liquidated damages deducted and withheld by Government fiscal officers from progress payments made to the contractor during his delayed performance be remitted if the Government should thereafter terminate the contractor's right to proceed. Since the head of the agency which awarded the contract would be the officer charged with the power of termination, the result reached below derogates substantially from the power conferred upon the Secretary of the Treasury by Section 21 of the 1902 Act "to remit the whole or any part" of liquidated damages "as in his discretion may be just and equitable" (see Appendix, p. 15).

2. Irrespective of Article 9, the United States was entitled to liquidated damages for the period between the stipulated completion date and the date when the contractor's right to proceed was terminated. The court below proceeded on the

[5] See Judge Madden's dissent in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 257–258.

assumption that Article 9 did not deal with a situation in which the contractor, although allowed to proceed after the stipulated completion date, was not permitted to complete the work. It concluded that the United States, because of its termination of the contractor's right to proceed in this instance, was remitted to its common law remedy for such actual damages caused by the delay as it was able to prove. But even on this interpretation of Article 9, the court's conclusion is erroneous. Entirely apart from Article 9, paragraph 5 of the specifications expressly obligated the contractor to pay the Government $25 liquidated damages "for each calendar day's delay in the completion of the contract." The 1902 statute which required that such a stipulation be included in the contract made it "conclusive and binding upon all parties," and provided that in suits arising thereunder it should be unnecessary for the United States "to prove actual or specific damages sustained * * * by reason of delays." The instant case falls foursquare within the ambit of the 1902 statute and of paragraph 5 of the specifications, entitling the United States to the liquidated damages accruing during the period of delayed performance.

3. The question is one of considerable importance. The interpretation of Article 9 of the standard form Government construction contract,

which was prepared by the Procurement Division of the Treasury Department, affects a very substantial part of all public construction and repair carried out by the United States, and all executive branches of the Government are required to use that form of contract unless specifically exempted by the Treasury Department. 41 Code of Federal Regulations §§ 11.1–11.3. The question of the right of the Government to recover or withhold liquidated damages from a contractor who continues performance after the stipulated completion date but fails to complete the work, is constantly arising, and the decisions of the lower courts are not in harmony.[8] Indeed, the General

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[8] The Court of Claims in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247 (Judges Whitaker and Madden dissenting), and the Court of Appeals for the District of Columbia in *United States* v. *Cunningham*, 125 F. (2d) 28, reached the same result as the court below under Article 9 of the standard form Government contract, although by different reasoning. In *Continental Casualty Co.* v. *United States*, 113 F. (2d) 284, the Circuit Court of Appeals for the Fifth Circuit affirmed a judgment allowing the United States to recover liquidated damages where the right to proceed was terminated after the contract completion date. That decision presents a conflict only in result, for the precise questions here involved were not presented to the court. However, provisions similar to Article 9, appearing in contracts between private parties, have been held to allow the owner to recover both excess costs and liquidated damages for delay, particularly where the contractor abandons after the time for completion has passed. *Southern Pacific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2); *City of Reading*

Accounting Office has advised that until an authoritative ruling to the contrary is obtained from this Court that office will continue to assess and withhold liquidated damages accruing prior to termination of the contractor's right to proceed [1]—a position which will breed litigation until the question is put at rest.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

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v. *U. S. Fidelity & Guaranty Co.*, 19 F. Supp. 350 (E. D. Pa.); *Six Companies of California* v. *Joint Highway District No. 13*, 110 F. (2d) 620 (C. C. A. 9), reversed on other grounds, 311 U. S. 180.

[1] This appears in letters from the Assistant Comptroller General to the Department of Justice dated, respectively, January 7, 1942, and April 18, 1942.

APPENDIX

Section 21 of the Act of June 6, 1902, c. 1036, 32 Stat. 326 (40 U. S. C. § 269), provides:

> In all contracts entered into with the United States * * * for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

Article 9 of the standard form of Government construction contract provides in part:

> DELAYS—DAMAGES.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such

part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *.

Paragraph 5 of the specifications of the contract here involved provides:

5. LIQUIDATED DAMAGES.—The contractor shall pay to the Government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract. (R. 8.)

U. S. GOVERNMENT PRINTING OFFICE: 1943